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No. _____

Supreme Court, U.S.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

OKLAHOMA TAX COMMISSION, PETITIONER,

V:

SAC AND FOX NATION, RESPONDENT.

**PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

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PRELIMINARY MATTER

QUESTIONS PRESENTED

1. Whether Sac and Fox tribal members who are employed by the Sac and Fox Nation are subject to Oklahoma income taxes on their wages earned from tribal employment.

2. Whether Sac and Fox tribal members who register their motor vehicle with the Tribe and buy a tribal license tag, thus become exempt from:

- a. The payment of Oklahoma motor vehicle excise taxes imposed on the tribal members' purchase of the vehicle, or
- b. Registering and licensing their vehicles under State law for use upon State roads & highways, and paying State license and registration fees imposed by State law.

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Petitioner, Oklahoma Tax Commission, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on June 16, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit is reported at ____ F.2d ____, and is reprinted in the appendix hereto, page A-1, *infra*.

The Order of the United States District Court for the Western District of Oklahoma (Alley, D.J.) has not been reported. It is reprinted in the Appendix hereto, page A-9, *infra*. The Order of the District Court on rehearing is not reported and is reprinted in the Appendix at page A-14, *infra*.

JURISDICTION

The opinion of the Court of Appeals for the Tenth Circuit was entered on June 16, 1992. No petition for rehearing was sought. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). The Federal jurisdiction of the District Court was invoked under 28 U.S.C. 1362 because the Respondent below is a federally recognized Indian Tribe.

STATEMENT OF THE CASE

1. Nature of the Controversy.

This case involves the Oklahoma Tax Commission's enforcement of State income taxes upon Sac and Fox tribal members who are employed by the Tribe and work primarily on Indian country within Oklahoma and the collection of the State's motor vehicle excise taxes and licensing and registration fees upon tribal members vehicles used upon the State's roads and highways.

The Sac and Fox Nation is a federally recognized Indian tribe located within the State of Oklahoma, which is organized pursuant to the Oklahoma Indian Welfare Act, 25 U.S.C. 501 et seq. The offices of the tribal headquarters are located near Stroud, Oklahoma, on a quarter-section (160 acres) excepted from operation of the Sac and Fox Allotment Agreement, Act of February 13, 1891, 26 Stat. 749, and is held in trust by the United States Government for the benefit of the Tribe. Within the area of the former Sac and Fox Reservation in central Oklahoma, the United States also holds other tracts of land in trust for the Tribe or its members. These tracts vary in size from a few acres to 640 acres and are not contiguous but are randomly scattered throughout the area among land that is otherwise within the jurisdiction of State government. The tribal trust land constitutes Indian Country as that term is defined in 18 U.S.C. §1151, and is within the jurisdiction of the tribal government. The Tribe employs both tribal members and nonmembers at its headquarters who primarily perform their duties on Indian Country at the headquarters building but may perform some duties off of Indian Country. Some employees of the Tribe may live on Indian Country and some employees do not live on Indian Country but no one resides at the tribal headquarters.

The Tribe imposes an income tax on both members and nonmembers who are employed by the Tribe. The Tribe also imposes taxes on motor vehicles owned by any person or entity which are principally garaged on Indian Country under the jurisdiction of the Sac and Fox Nation. The Oklahoma Tax Commission does not challenge the Tribe's right to impose these taxes, but claims that the tribal members and nonmembers are also obligated to pay State income and motor vehicle taxes pursuant to State law, regardless of whether or not tribal taxes have been paid by those individuals.

The State imposes an income tax on all residents and nonresidents who receive income in Oklahoma pursuant to the Oklahoma Income Tax Act, 68 O.S. 1991 §2351 et seq. All tribal employees, whether tribal members or nonmembers, or any person who receives income for employment or work performed on Indian Country or elsewhere within Oklahoma are subject to pay Oklahoma income taxes. The State does attempt to assess and collect the income tax from such persons if they fail to report their income and pay those taxes.

The State also imposes a motor vehicle excise tax on the transfer of ownership or use of a motor vehicle in this State pursuant to the Vehicle Excise Tax Act, 68 O.S. 1991 §2101 et seq., and the State imposes an annual registration fee on the owners of every vehicle operated upon, over, along or across any avenue of public access in this State pursuant to the Oklahoma Vehicle License and Registration Act, 47 O.S. 1991 §1101 et seq. The Commission enforces the motor vehicle tax when a person, who had purchased a tribal license for their vehicle, subsequently sold that vehicle. The subsequent owner of the vehicle is required to pay the delinquent back taxes on the vehicle for the years the vehicle was tribally licensed in order to obtain an Oklahoma title and license plate for the car. The Commission will not issue a title on the basis of the previous owner's tribal title because the Commission contends that the State taxes are properly due and owing for that period.

2. The Proceedings Below.

Because the Commission had assessed tribal employees for income taxes on wages from tribal employment and had required that delinquent motor vehicle taxes be paid for the period a vehicle was tribally licensed when the vehicle was sold, the Tribe brought an action against the Commission in the United States District Court for the

Western District of Oklahoma to enjoin the Commission from enforcing the State income and motor vehicle taxes against its tribal members and others. The jurisdiction of the District Court was invoked under 28 U.S.C. §1362 because the Respondent is a federally recognized Indian tribe.

The District Court entered its Order on April 17, 1991, disposing of the litigants cross-motions for summary judgment. This Order is reprinted at page A-9 in the Appendix. The District Court found that the State should be enjoined from enforcing income taxes against wages earned by tribal members from tribal employment but that nonmembers employed by the Tribe were subject to State income tax.

The Court also enjoined the State from enforcing its motor vehicle taxes against a tribal member who properly licensed the vehicle with the Tribe by requiring the payment of the delinquent back taxes when the vehicle was sold. However, the injunction only extended to tribal members who own vehicles that are primarily garaged on trust land and licensed by the tribe of which they are members. Nonmembers of the tribe were required to pay all applicable State motor vehicle taxes. The District Court denied the motions for rehearing filed by each party, see Order at page A-14.

Both parties appealed this decision to the United States Court of Appeals for the Tenth Circuit. The Tenth Circuit's opinion, reprinted at page A-1, affirmed the decision of the District Court. Both the Tenth Circuit and the District Court declined to reach the issue of the extent of the Sac and Fox Reservation or whether the Reservation had been disestablished and refused to enter the required individualized treatment of particular treaties and specific federal statutes as they affect the respective rights of States, Indians, and the Federal Government, *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973). Instead, the lower courts concluded that under the authority of *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973), tribal members in any circumstances employed by the Tribe are not subject to State income taxes and pursuant to this Court's opinion in *Washington v. Confederated Tribes of Colville*, 447 U.S. 134 (1980), those tribal members were not responsible for State motor vehicle taxes either.

REASONS FOR GRANTING THE WRIT

The Tenth Circuit Court of Appeals has rendered a decision

which is in conflict with applicable decisions of this Court by enjoining the State from enforcing its tax laws or collecting its taxes against the individual tribal members in this case. The Appeals Court misconstrued the holding of this Court in the *McClanahan* case and opined that the tribal members' wages earned from tribal employment were per se exempt from State income taxes. This exemption was not drawn from any language or holding in the *McClanahan* case but instead was constructed from what the Appeals Court called the "essence" of the decision. The Tenth Circuit ignored the decisions from this Court which hold that the income of Indians in Oklahoma is taxable as well as those parts of the *McClanahan* opinion that oppose the Tenth Circuit's theory of the case.

The Appeals Court likewise miscast this Court's decision in *Colville* regarding the exemption from motor vehicle taxes. Again, the Appeals Court held that tribal members were not required to pay motor vehicle taxes as a per se rule rather than consider the particular circumstance of these individuals and balance the interest of the Tribe against the interests of the State in order to determine whether these individuals were entitled to an exemption. As a result, the Tenth Circuit misapplied the authority of the *Colville* case to the facts of this case and created an exemption where none existed before. Because the Tenth Circuit has decided a federal question in conflict with applicable decisions of this Court, review by this Court is urgently required.

I. THE TENTH CIRCUIT'S OPINION WHICH EXEMPTS TRIBAL MEMBERS FROM STATE INCOME TAX ON TRIBAL WAGES IS IN CONFLICT WITH DECISIONS OF THIS COURT.

The Tenth Circuit concluded that this Court's decision in *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973), entirely disposed of the issue in the Tribe's favor of whether the tribal members in the case at bar were liable for State income taxes. After reaching this conclusion, the Tenth Circuit stated, "It would serve little purpose to retrace the *McClanahan* analysis here." The Tenth Circuit's failure to enter any analysis of this case is the reason why the opinion is in conflict with the decision of this Court upon which the Appeals Court relies.

Contrary to the Tenth Circuit's opinion, the Commission sub-

mits that the *McClanahan* decision strongly supports its position that tribal members who work for the Sac and Fox Nation are properly subject to State income taxes. In *McClanahan*, this Court began its analysis with the relevant treaty. In comparison, the Tenth Circuit stated in footnote 2 of its opinion that, "The focus in this type of case is tribal immunity from state jurisdiction." However, this Court has stated at 411 U.S. 172:

[T]he trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption...The modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power...The Indian sovereignty doctrine is relevant, then, not because it provides a definitive resolution of the issues in this suit, but because it provides a backdrop against which the applicable treaties and federal statutes must be read. (citations omitted)

Therefore, this Court began its analysis in *McClanahan* with the treaty which the United States Government entered with the Navajo Nation in 1868. This Court found that the treaty nowhere explicitly states that the Navajo's were to be free from state law or exempt from state taxes, however, the reservation of certain lands for the exclusive use and occupancy of the Navajo's and the exclusion of non-Navajos from the prescribed area was meant to establish the lands as within the exclusive sovereignty of the Navajos under general federal supervision. Therefore, this Court's interpretation of the Navajo treaty precluded the extension of any State law to Indians on the Navajo reservation.

The case at bar has no such basis upon which state laws can be pre-empted. Pursuant to the Treaty with the Sacs and Foxes, February 18, 1867, 15 Stat. 495, the United States agreed in Article VI of the Treaty to "give to the Sacs and Foxes for their future home a tract of land in the Indian Country South of Kansas, and South of the Cherokee lands, not exceeding seven hundred and fifty square miles in extent."

The Sac and Fox Reservation was granted to the Tribe in exchange for cessions of tribal lands in other states from which the Tribe was being removed. The United States also agreed to pay a dollar an

acre for the ceded lands plus all outstanding indebtedness of the Tribe. In contrast to the Navajo treaty, the Sac and Fox Nation was not returning to their permanent home in a portion of what had been their native country in return for promises to keep peace. Rather, the Sac and Fox treaty reads more like a land deal.

But more important than that is the fact that the Sac and Fox Treaty was superseded by the Sac and Fox Allotment Agreement, Act of February 13, 1891, 26 Stat. 749. This is a fact that did not occur in *McClanahan*. Under this Act the Sac and Fox Nation cedes, conveys, transfers, surrenders and forever relinquishes to the United States of America, all their title, claim or interest, of every kind or character, in and to the reservation. The Act provided that the quarter section of land where the Sac and Fox Agency is located would remain the property of the Tribe as well as the section of land designated for a school and farm. The Act also provided that each tribal member could select a quarter section for an allotment and, under Article IV, in consideration for the cession of land, the United States agreed to pay \$485,000.00 to the Tribe. The surplus land was then opened for homesteading on September 22, 1891, by the Presidential Proclamation of September 18, 1891, 27 Stat. 989.

Because of this intervening factor, the situation of the Sac and Fox is incongruous with that of the Navajo's in *McClanahan*. The Allotment Agreement, which disestablished the Sac and Fox Reservation, cannot be interpreted to preclude the extension of state law. It was the Congressional policy at that time to disestablish and individualize all of the reservations in Indian Territory with a view to the ultimate creation of the State of Oklahoma, see *Woodward v. DeGraffenried*, 238 U.S. 284 (1915), for a description of the vast problems experienced with the reservation system in Indian Territory and the efforts of Congress to dispose of the reservations to solve those problems. In this case, the relevant statute, the Allotment Agreement, was intended by the Congress at the time, to assimilate these tribes into the general society which would form a State to make laws for all persons. The objectives of allotment were simple and clear-cut: to extinguish tribal sovereignty, erase reservation boundaries and force the assimilation of Indians into the society at large, *County of Yakima v. Yakima Indian Nation*, 112 S.Ct. 683 (1992). In this case, the allotment agreement is the relevant statute and it cannot be construed as a pre-emption of State laws.

However, there are two independent, but related, barriers to the

assertion of state regulatory authority over tribal reservations and members. First, the exercise of such authority may be pre-empted by federal law, and second, it may unlawfully infringe on the right of reservation Indians to make their own laws and be ruled by them, *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). The Commission reasoned in the courts below that if the State taxes are to be barred because they infringe the rights of reservation Indians, then the Court must determine the extent of the reservation involved.

In footnote 2 of its Opinion, the Tenth Circuit concludes in light of this Court's ruling in *Oklahoma Tax Commission v. Citizen Band Potawatomi Tribe*, ___ U.S. ___, 111 S.Ct. 905 (1991), that since trust land in Oklahoma is validly set apart and thus qualifies as a reservation for tribal immunity purposes, it is unnecessary to determine the existence or the extent of the reservation and therefore, the *McClanahan* case applies to exempt tribal members from income taxes despite the physical dissimilarity between the 7.6 million acre Navajo reservation and the Sac and Fox quarter section.

However, the Commission proposes that the reservation boundary has always been a prime consideration in determining the right of the State to tax, or of tribal members to be free from tax. This Court has held in *Bracker* at 448 U.S. 151:

The Court has repeatedly emphasized that there is a significant geographical component to tribal sovereignty, a component which remains highly relevant to the pre-emption inquiry; though the reservation boundary is not absolute, it remains an important factor to weigh in determining whether state authority has exceeded the permissible limits.

The distinction between on-reservation activity and off-reservation activity is drawn by the companion cases of *McClanahan* and *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973). In *McClanahan*, the appellant was a tribal member who lived on the Navajo Reservation and earned all of her income within the reservation and was held not to be subject to State income taxes. In *Mescalero*, the Tribe owned and operated a ski resort off of its reservation and was required to pay State gross receipts taxes on its sales. But the situation in this case does not fall neatly within or without the reservation because the Indian Country

herein lies scattered among land over which the State retains jurisdiction.

Although the Sac and Fox member employees work at the tribal headquarters on Indian Country, when they leave for home, they pull their cars out of the tribal parking lot and on to state jurisdiction streets. When they arrive at home, it may or may not be on Indian Country. There is no evidence in this case to show that any tribal employees live on Indian Country. The Tenth Circuit held that the tribal members off reservation activity did not matter. Since they did work on Indian Country, that was enough to satisfy the Appeals Court that *McClanahan* applied to exempt the members from income tax. Besides the bare citation to *McClanahan*, the Tenth Circuit never explained which federal statute pre-empted the State taxes or how tribal self-government on the reservation was infringed when individuals were taxed on their income when they left the reservations. In order to qualify for the *McClanahan* exemption, a tribal member must live and work exclusively on the reservation, which is not the case presented here.

This Court has had occasion to rule on the issue presented here in the case of *Leahy v. State Treasurer of Oklahoma*, 297 U.S. 420 (1936). In that case a member of the Osage tribe who held a certificate of competency was taxed by the State on his pro rata share of the income of the restricted mineral resources of the Tribe. This Court cited its opinion in *Choteau v. Burnet*, 283 U.S. 691 (1931) for its reasoning that an Osage Indian's income from the tribal mineral resources is subject to federal tax. The Court found that the course of legislation discloses that the plan of the government has been gradually to emancipate the Indian from his former status as a ward; to prepare him for complete independence by education and the gradual release of his property to his own individual management. This plan has included imposing upon him both the responsibilities and the privileges of the owner of property, including the duty to pay taxes. The Court reasoned that his share of the tribal mineral resources was payable to him without restriction upon its use and was therefore taxable by the federal government because of his untrammelled ownership of the income.

The Tenth Circuit opinion in the case at bar cannot be reconciled with this Court's authority in *Leahy*. Both cases involve tribal members earning income from tribal sources on Indian Country which is paid to them without restriction. Clearly, the Tenth Circuit opinion is in conflict with this applicable decision. The Tenth Circuit refused to

consider the authority in *Leahy* and granted this exemption only on the status of the taxpayer as an Indian.

Further, this Court distinguished the situation of the Oklahoma Indians from reservation tribes in *Oklahoma Tax Commission v. United States*, 319 U.S. 598 (1943). That case dealt with the imposition of estate taxes against the estates of members of the Five Civilized Tribes in Oklahoma. The estates consisted of holdings of trust land or Indian Country, exempt from direct taxation; land holdings not exempt from direct taxation; restricted cash and securities held for the Indians by the Secretary of Interior; miscellaneous personal property and insurance. All assets were taxable by the State except for the trust land exempt from direct taxation. The Court stated at 319 U.S. 602:

The many cases dealing generally with the problem of Indian tax exemptions provide no basis for the government's argument that Congress, in view of the existing legal framework, must have assumed that it would immunize the securities and cash from estate taxes by restricting their alienation. *Worcester v. Georgia*, 6 Pet. 515 (1832), held that a state might not regulate the conduct of persons in Indian territory on the theory that the Indian tribes were separate political entities with all the rights of independent status - a condition which has not existed for many years in the State of Oklahoma.

The Court concluded that the underlying principles on which the reservation decisions are based do not fit the situation of the Oklahoma Indians. Therefore, the estate taxes imposed on the tribal members' estates was valid even though the tribal members lived on Indian Country in Oklahoma. The Court explained at 319 U.S. 604 that the cash and securities of which these estates are almost entirely composed were restricted by the Act of January 27, 1933, 47 Stat. 777. Unless the tax immunity is granted by the restriction clause itself, there is not a word in the Act which even remotely suggests that Congress meant to exempt Indians' cash and securities from Oklahoma's estate taxes. The Court concluded that this Act does not exempt the restricted property from taxation for two reasons: (1) the legislative history of the Act refutes the contention that an exemption was intended; and (2) applica-

tion of the normal rule against tax exemption by statutory implication prevents our reading such an implication into the Act.

These cases from Oklahoma demonstrate that there is no federal pre-emption of the tax laws of Oklahoma because the relevant statutes which disestablished the several reservations in Oklahoma were intended to facilitate statehood and a constitutional state government rather than exclude state government as in the case of the Navajo treaty. Also, the taxation of tribal members in Oklahoma does not infringe upon tribal self-government because there is no reservation boundary which would serve to invest tribal sovereignty with the essential geographical component. This fact was recognized in *Oklahoma Tax Commission* at 319 U.S. 603 where the Court held that, "although there are remnants of the form of tribal sovereignty, these Indians have no effective tribal autonomy as in *Worcester v. Georgia*." *McClanahan* cited *Oklahoma Tax Commission* as an example of Indians who do not inhabit reservations set aside for their exclusive use and who have become assimilated into the general community such that the sovereignty doctrine has not been rigidly applied to their situation.

The Tenth Circuit opinion avoided discussion of the obviously contrary opinion in *Oklahoma Tax Commission v. United States*, and instead cited *Oklahoma Tax Commission v. Citizen Band Potawatomi Tribe*, ___ U.S. ___, 111 S.Ct. 905 (1991) for the proposition that trust land in Oklahoma qualifies as a reservation for tribal immunity purposes. Although the citation is accurate, it does not apply to this case. No one is questioning the authenticity of the Indian Country in this case. But *Potawatomi* involved the State's attempt to directly tax a tribe for activity wholly within Indian Country. That is not the case presented by the Sac and Fox. In the case at bar, the State is not taxing a tribe but individual tribal members, off of Indian Country. Of course, the tribal members earn their income on Indian Country, but at the end of the working day, the member employees leave Indian Country. There is not an exclusive reservation upon which tribal members live and earn all of their income. Taxation of tribal members off of the reservation has always been permissible and never infringes tribal self-government. *Mescalero*.

Therefore, the opinion of the Tenth Circuit in this matter conflicts with the opinions of this Court in *Choteau*, *Leahy*, *Oklahoma Tax Commission v. United States*, *McClanahan* and *Mescalero*, among others.

II. THE TENTH CIRCUIT'S OPINION REGARDING STATE MOTOR VEHICLE TAXES IMPOSED ON TRIBAL MEMBERS IS CONTRARY TO OPINIONS OF THIS COURT.

In part two of the Opinion below, the Tenth Circuit held that a state may not require tribal members who properly license their vehicles with the Tribe to pay state motor vehicle taxes, whether in the nature of property or excise taxes. The lower court found these taxes to be prohibited by *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976) and *Washington v. Confederated Tribes of Colville*, 447 U.S. 134 (1980), because according to the Court of Appeals, both Oklahoma motor vehicle taxes are property taxes. Not only did the Court mischaracterize these taxes, the result of the Courts opinion is to allow the Tribe, by selling tribal license plates, to market an exemption contrary to this courts ruling in *Colville*.

Oklahoma levies two different taxes on motor vehicles. The first tax is the Vehicle Excise Tax found at title 68 O.S. 1991 §2101 et seq. Pursuant to Section 2103 of this Act, an excise tax of 3 1/4% of the value of each vehicle is levied upon the transfer of legal ownership of any vehicle registered in this State. Next, an annual registration fee is imposed under the Oklahoma Vehicle License and Registration Act, title 47 O.S. 1991 §1101 et seq. Pursuant to Section 1132 of this Act, Subsection A sets out the following fees: (1) a registration fee of \$15.00 per year for the use of the avenues of public access within this state, and (2) an annual fee in lieu of all other taxes of 1 1/4% of the factory delivered price for the first year and in each subsequent year the fee will be 90% of the previous year's fee.

Section 1103 of the Registration Act states that, it is the intent of the Legislature that the owner or owners of every vehicle in this state shall possess a certificate of title as proof of ownership and that every vehicle shall be registered in the name of the owner or owners thereof. All registration and license fees and mileage taxes imposed by this Act shall be for the purpose of providing funds for the general governmental functions of the state, counties, municipalities and schools and for the maintenance and upkeep of the avenues of public access of this state. Such registration and license fees shall apply to every vehicle operated upon, over, along or across any avenue of public access within this state and when paid in full, shall be in lieu of all other taxes, general and local,

unless otherwise specifically provided.

Although the Tenth Circuit claimed these two taxes were property taxes, the Supreme Court of the State of Oklahoma has held that both the vehicle registration fee and the vehicle excise taxes are excise taxes rather than property taxes in *Application of Baptist General Convention of Oklahoma*, 195 Okl. 258, 156 P.2d 1018 (1945). As to what manner of tax we are dealing with, the law to be applied in this case is the law of the State. The authority and only authority is the State, and if that be so, the voice adopted by the State as its own, whether it be of its Legislature or of its Supreme Court, should utter the last word, *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). This Court held in *Moe* and *Colville* that the States in those cases could not impose personal property taxes on vehicles owned by tribal members resident on the reservation and used both on and off the reservation. The Commission submits that this is a different case because the taxes at issue are excise taxes imposed on tribal members who do not live on a reservation and use their vehicles entirely off of Indian Country. The Commission would suggest that the present taxes are therefore valid pursuant to *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973).

A. Vehicle Excise Taxes.

The Vehicle Excise Tax does not appear to be fully comprehended in the Tenth Circuit opinion which characterizes the tax as a property tax. However, this tax is not paid annually as property taxes are. This tax is paid by the purchaser of the vehicle in order to obtain a certificate of title. The tax is only paid when a vehicle is sold and the new owner applies to the Commission to have the vehicle titled in his or her name. Therefore, if Vehicle No. 1 is sold five times in ten years, each of the successive owners will pay an excise tax in order to transfer the title, for a total of five taxes. But if Vehicle No. 2 is sold only once in that same ten-year period, only one vehicle excise tax will have been required for Vehicle No. 2 compared to five taxes that the owners of Vehicle No. 1 were required to pay.

The Vehicle Excise Tax closely resembles a sales tax. Certainly the Tribe would not propose that when a tribal member patronizes a grocery store off of Indian Country, the tribal member should be exempt from sales taxes on his or her purchases. There is simply no authority for such a position. But in this case, the Tribe is proposing that when

a tribal member shops for a car at an automobile dealership, which are all off of Indian Country, the tribal member's purchase of a vehicle off of Indian Country should be exempt from the Vehicle Excise Tax. This position finds no authority in *Moe* or *Colville*. A tax which is imposed on a tribal member for activity or purchases off of Indian Country is neither pre-empted by federal law nor is it invalid as an infringement of tribal self-government.

The case is much different than *Moe* and *Colville* because those cases involved massive reservation created by treaty. In *Moe*, the Treaty of Hell Gate, 12 Stat. 975 set aside 1.25 million acres for the Flathead reservation in Montana. In *Colville* the Colville Reservation encompasses 1.3 million acres in Washington established by Executive Order on July 2, 1872. The Court found at 447 U.S. 156 that the relevant treaties pertaining to the Colville tribes can be read to recognize inherent tribal power to exclude non-Indians or impose conditions on those permitted to enter. But in the case at bar, the Sac and Fox Treaty was discarded, the reservation disestablished, and the Tribe was not allowed the power to exclude non-Indians or impose any conditions on them because the federal government opened the land to a flood of white settlers who soon organized the territory for Statehood. Therefore, the relevant statute, the Allotment Agreement in this case, contemplated that State law would be applied rather than excluded. As a result, only scattered plots of Indian Country remain in Oklahoma and, for purposes of this argument, the Commission can safely represent that no car dealerships sell cars within Indian Country.

Under the auspices of the Allotment Agreement in this case, in light of its policy and the intended result, it cannot be rationally argued that the Congressional plan intended to pre-empt the state taxing authority in the manner proposed by the Tenth Circuit. There is no immunity for off-reservation activities that have traditionally been recognized in any of the controlling cases. The backdrop of the Indian sovereignty doctrine does not provide any tradition of immunity with regard to this allotment agreement because it was never the intention of Congress to preclude the extension of State law in this area. Therefore, the Tenth Circuit improperly prohibited the Vehicle Excise Tax as applied to tribal members in this case.

B. Vehicle Registration Fees.

The vehicle registration fees under title 47 O.S. 1991 §1101 are similar to the property taxes discussed in *Moe* and *Colville* in that the fee is imposed annually for vehicles used in Oklahoma. However, the Oklahoma Supreme Court has held that the registration fee is an excise tax in *Application of Baptist General Convention of Okla.*, 195 Okl. 258, 156 P.2d 1018 (1945). In that case, the Baptist General Convention contended that it did not have to pay the motor vehicle taxes because the Oklahoma Constitution Art. X, §6 exempted from tax "all property used exclusively for religious and charitable purposes." The Supreme Court ruled that the Baptist General Convention was required to pay motor vehicle taxes because the excise tax and registration fees are both excise taxes and the constitutional exemption only applies to property taxes.

However, the *Colville* opinion indicated at 447 U.S. 163 that the tax will not escape the prohibition merely by calling the tax an excise tax on the use of the vehicle in the State. But the tax in *Colville* was prohibited in the first place only because the tribal members subject to the tax lived on the massive reservation set aside for their use under general federal supervision in which the relevant treaties leave to the exclusive province of the federal government and the tribes. That is not the case presented here.

In this case, the Allotment Agreement does not propose that any State tax law would be pre-empted. If Congress intends to prevent the State of Oklahoma from levying a general nondiscriminatory tax applying alike to all its citizens, it should say so in plain words. Such a conclusion cannot rest on dubious inferences, *Oklahoma Tax Commission v. United States*. Indian sovereign immunity from nondiscriminatory taxation is a question of congressional pre-emption. In this case, the backdrop of the several allotment agreements does not provide the necessary level of federal supervision and exclusive control that is sufficient to pre-empt these taxes, coupled with the lack of any intent on the part of Congress to do so. This Court has cautioned against invalidating any state taxation absent the clearest mandate, *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976). Congress has declined to extend such a mandate to the Indians in this case. Given the attitude of Congress in the Allotment Agreement, Congress never intended to prevent Oklahoma from levying these taxes, which is the primary consideration in the pre-emption inquiry.

Another aspect of this case is the balancing approach used in the

Colville decision to evaluate these types of taxes. At 447 U.S. 156-157 this Court stated:

While the Tribes do have an interest in raising revenues for essential governmental programs, that interest is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services. The State also has a legitimate governmental interest in raising revenues, and that interest is likewise strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services.

In the case at bar, the State has the strongest interest in imposing its annual registration fee as opposed to the Tribe because the State has the sole obligation of building and maintaining roads in Oklahoma as well as providing related government services to the motoring public. The tribal member taxpayers in this case are the direct beneficiaries of these roads and services which are not provided by the Tribe. Also, the registration fees are directed at off-reservation value.

In Oklahoma, neither the Sac and Fox, nor any of the other forty different tribes located here, build or maintain streets roads or highways since the Indian Country is broken up into small scattered tracts and the State provides all the necessary roads in the first place. The Sac and Fox have built driveways or parking lots on their land, but this is nothing that any other private landowner would not do. However, the total mileage of driveways built by the Sac and Fox is de minimum compared to the over 111,000 miles of roads provided by the State and local governments. However, the Tribe argues that tribal employees park their cars on Indian Country for a much greater part of the workday than the drive time in which those cars are on State jurisdiction roads. The State submits that this may be true but irrelevant because the value of an automobile is principally realized by using it to travel across the roadways rather than parking it in a parking lot. The registration fees are therefore aimed at off-reservation value since the use of a vehicle in Oklahoma is necessarily off-reservation only.

The State vehicle registration system also provides safety and security to the motoring public. The State registration provides information on the ownership of vehicles that can be accessed by police when

vehicles are involved in criminal activity. Also, the State requires vehicle registrants to carry automobile insurance to provide financial responsibility for damage that the operator of a vehicle may cause. The State title laws protect the ownership interest in vehicles as well as the security interest of financial institutions who lend on the vehicle as collateral by providing a statewide filing system to record this information with the Tax Commission and other State law enforcement agencies that safeguard the vehicle from theft, title counterfeiting, title laundering, or tampering with odometer readings. If the Tax Commission is compelled to accept at face value a title from any one of forty different tribal governments in this state, the functions of the State registration system would be compromised. If motor vehicle titles could be easily obtained at low cost from a variety of tribal governments which have less experience and sophistication in maintaining proper controls over a registration system, along with the fact that tribal records are inaccessible to state agencies, then that situation would result in unacceptable losses to auto dealers, banks, insurance companies and automobile owners and buyers as well as hindering law enforcement.

On the other side of the scale, the only thing the Tribe offers for its registration is the opportunity for the registrant to pay tribal taxes. The Tribe will provide no roads or any of the attendant governmental services that the State provides to vehicle owners. Under the balancing approach, the Tribe offers little of anything in return for its taxes while the State provides the totality of transportation and governmental services to these taxpayers. This is a case in which the State seeks to assess taxes in return for governmental functions it performs for those on whom the taxes fall. Since the federal legislation disestablishing the reservations in Oklahoma has left the Tribe with no duties or responsibilities respecting road building and related services, it cannot be contended that Congress intended to leave to the Tribe the privilege of levying this tax to the exclusion of similar State taxes. The State does not contend that the Tribe should be prohibited from levying this or any tax, but the State does contend that the tribal tax levy does not oust the imposition of State taxes on tribal members' activities off of Indian Country. The Tenth Circuit never considered these factors in its opinion and invalidated the state taxes without a thorough review of state law and precedents necessary to determine whether the scheme in fact contravenes federal law.

CONCLUSION

Because the Tenth Circuit Court of Appeals has decided an important question of federal law in conflict with applicable decisions of this Court, review by this Court is urgently required. For these reasons, a writ of certiorari should issue to review the Order and judgment of the Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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APPENDIX A
PUBLISH

UNITED STATES COURT OF APPEALS
 FOR THE TENTH CIRCUIT

SAC AND FOX NATION,)	
Appellee/Cross-Appellant,)	
)	
)	
v.)	Nos. 91-6236 and
)	91-6237
OKLAHOMA TAX COMMISSION,)	
Appellant/Cross-Appellee.)	

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
 FOR THE WESTERN DISTRICT OF OKLAHOMA
 (D.C. No. CIV-90-1553-A)

G. William Rice (N. Brent Parmer and Gregory H. Bigler with him on the briefs) of G. William Rice, P.C., Cushing, Oklahoma, for Plaintiff-Appellee and Cross-Appellant.

David Allen Miley, Assistant General Counsel (David Hudson, General Counsel, with him on the briefs), Oklahoma Tax Commission, Oklahoma City, Oklahoma, for Defendant-Appellant and Cross-Appellee.

Before MOORE and BRORBY, Circuit Judges, and HUNTER,* District Judge.

BRORBY, Circuit Judge.

* The Honorable Elmo B. Hunter, Senior District Judge for the District of Missouri, sitting by designation.

We are called upon here to resolve two issues arising from a conflict between the asserted taxing power of the State of Oklahoma and the tax immunity claimed by the Sac and Fox Nation, a federally recognized Indian tribe: (1) whether the Oklahoma Tax Commission has legal authority to tax income derived from the Sac and Fox; and (2) whether the Oklahoma Tax Commission has legal authority to impose an excise tax and licensing fee on motor vehicles properly tagged by the Sac and Fox. We conclude the district court succinctly characterized the relevant issues and correctly applied existing precedent. We therefore affirm.

I. Background

Both parties appeal the district court's ruling on cross motions for summary judgment.¹ Notably, neither party argues that summary judgment was procedurally incorrect due to the existence of a genuine issue of material fact. Instead, they challenge the legal determinations made by the district court after applying relevant authority to the stipulated facts. We review those determinations de novo. *Brown v. Palmer*, 944 F.2d 732, 733-34 n.1 (10th Cir. 1991) (citing *Gonzales v. Millers Casualty Ins. Co.*, 923 F.2d 1417, 1419 (10th Cir. 1991)).

Factually, the record reveals this dispute arises primarily on land held in trust by the United States Government for the benefit of the Sac and Fox (also referred to as "the Tribe"). These lands consist of Tribal headquarters which are located in central Oklahoma on a quarter section (160 acres) excepted from operation of the Sac and Fox Allotment Agreement Act of February 13, 1891; one section (640 acres) reserved from the Allotment Agreement for the Sac and Fox School; and remaining individual trust allots owned by the Sac and Fox.

The Sac and Fox brought this suit in response to Oklahoma's

¹ The district court held: (1) the State may properly levy and collect income tax on income derived from tribal employment on trust lands and received by non-tribal members; however, the State may not sue the Tribe for damages to collect the tax; (2) the State may not levy or collect income tax on income derived from tribal employment on trust lands and received by tribal members; (3) the State may not, as a prerequisite to issuing an Oklahoma motor vehicle title, require payment of an excise tax and license tag fee for those years a vehicle was tagged properly by the Tribe. The State appeals that part of the judgment restricting state tax authority over tribal members, while the Tribe cross appeals that part of the judgment granting the State tax authority over nonmembers.

assertion of tax authority over income derived from the Tribe and over motor vehicles properly tagged by the Tribe. The Complaint prayed for an injunction preventing the Oklahoma Tax Commission from enforcing state tax laws against persons residing or employed within Sac and Fox territorial jurisdiction. The Tribe asserted sovereign immunity as the basis for its claim.

The Sac and Fox Tribe employs both tribal members and nonmembers. The earnings of all tribal employees are subject to a tribal income tax. While the Oklahoma Tax Commission does not challenge the Tribe's right to levy its own tax, the Commission claims all tribal employees must also pay state income taxes. The Commission enforces state income taxes against tribal members and nonmembers by issuing tax assessments against individuals failing to pay the state tax.

The Tribe also taxes the ownership of motor vehicles principally garaged on land within its jurisdiction. Upon payment of the tribal tax, each motor vehicle owner receives a Sac and Fox license plate, certificate of title and registration certificate. Here again, the Oklahoma Tax Commission does not contest the Tribe's tax authority. However, the State requires "retroactive" payment of money equivalent to the taxes, penalties, and interest it would have imposed upon motor vehicles during the time they were taxable by the Tribe as a prerequisite to issuance of an Oklahoma title and registration when such vehicles are sold, traded, or otherwise removed from tribal jurisdiction.

Against this factual background, we begin our legal analysis from the premise first enunciated in *McClanahan v. Arizona State Tax Comm'n.*, 411 U.S. 164 (1973), that direct state taxation of tribal property or the income of a tribal member earned solely on a reservation is presumed to be preempted, absent express congressional authorization. *See also California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215-16 & n.17 (1987); *Bryan v. Itasca County*, 426 U.S. 373, 375-77 (1976); *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 475-76 (1976); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973). Conversely, a state may nondiscriminatorily tax nonmember activities on a reservation so long as such taxation does not conflict with relevant statutes or treaties or impermissibly interfere with a tribe's ability to govern itself. *See Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 175 (1989); *Cabazon*, 480 U.S. at 215-16; *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 151-61 (1980). Moreover, we acknowledge that trust land, validly set

apart for Indian use under government supervision, "qualifies as a reservation for tribal immunity purposes." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, ____ U.S. ____, ____, 111 S.Ct. 905, 907 (1991).²

II. Income Tax

A. Taxation of Tribal Members

In *McClanahan*, the Supreme Court held the State of Arizona could not levy or collect an income tax on wages earned by a Navajo tribal member from her work on the Navajo reservation. 411 U.S. at 173. Applying a federal preemption analysis against the backdrop of the Indian sovereignty doctrine, the Court reasoned that "by imposing the [income] tax ... the State has interfered with matters which the relevant treaty and statutes leave to the exclusive province of the Federal Government and the Indians themselves."³ *Id.* at 165.

It would serve little purpose to retrace the *McClanahan* analysis here. The Sac and Fox is a federally recognized Indian tribe operating under a tribal constitution and federal corporate charter.⁴ The treaties,

² On Appeal, the State asserts as error the district court's failure to determine the status of the Sac and Fox Reservation. In light of the Supreme Court's ruling in *Potawatomi*, we fail to see the relevancy of this issue. It appears as though the State of Oklahoma persists in fighting a battle it has already lost.

The focus in this type case is tribal immunity from state jurisdiction. The Supreme Court has made it clear that established principles of tribal immunity extend to trust lands as well as reservations. *Potawatomi*, 111 S. Ct. at 907. Oklahoma's attempt to circumvent this rule by shifting the focus and by emphasizing the physical dissimilarity between the large Indian reservations involved in prior cases and the randomly scattered trust lands of the Sac and Fox amounts to an exercise in futility. The State cites no authority for its proposition that the size and physical distribution of Indian country should control the degree of tribal immunity asserted on those lands. The State does not challenge the presence of Sac and Fox trust land, nor does it assert the Sac and Fox Tribe is exercising jurisdiction outside that land. We therefore agree with the district court that the status of the Sac and Fox Reservation is not a material issue in this case.

³ We reject the State's contention that the tax immunity recognized in *McClanahan* is limited to only those Indians residing on the reservation, or in this case on the tribal trust lands. The State's narrow reading of *McClanahan* violates the essence of the decision which afforded immunity from state taxation for Indian income derived from employment on tribal lands. *See Moe*, 425 U.S. at 475-476; *Mescalero*, 411 U.S. at 148.

⁴ The Sac and Fox Tribe, like the Navajo in *McClanahan* and the Salish and Kootenai in *Moe*, plainly has not abandoned its tribal organization.

statutes and correspondence cited by both parties indicate Congress consistently has recognized the integrity of the Sac and Fox Tribe and its right to self-govern within relevant jurisdictional boundaries. Nothing in the record conflicts with the acknowledged contemporary congressional goal of Indian self-government, including tribal self-sufficiency and economic development. *See Cabazon*, 480 U.S. at 216. This case is therefore indistinguishable from *McClanahan* in that tribal compensation of Sac and Fox member-employees falls totally within the sphere of activity reserved to the federal government and to the Sac and Fox Tribe itself. *See* 411 U.S. at 179-80.

The State asserts no congressional authority for imposing the state taxes at issue. Therefore, applying the *McClanahan* presumption, we conclude Oklahoma has exceeded its authority -- the state income tax is unlawful as applied to Sac and Fox members whose income is derived solely from tribal sources on tribal lands.

B. Taxation of Nonmembers

When evaluating Oklahoma's authority to tax the income of nonmember tribal employees, precedent weighs in the State's favor. Although the Supreme Court has never explicitly addressed state taxation of nonmember income derived from tribal sources, the Court has, in general, considered favorably nondiscriminatory state taxation of nonmember activities on a reservation so long as such taxation does not conflict with relevant statutes or treaties or impermissibly interfere with a tribe's ability to govern itself. *Colville*, 447 U.S. at 151-61; *Moe*, 425 U.S. at 481-83. *See also Cotton Petroleum*, 490 U.S. at 175; *Cabazon*, 480 U.S. at 215-16. In other words, state taxation of nonmember activity on a reservation is legitimate if the burden imposed on the tribe is minimal -- if the tax does not frustrate tribal self-government or run afoul of congressional enactments concerning the affairs of reservation Indians. *Moe*, 425 U.S. 483 (citations omitted).

The Tribe relies primarily on the Indian Commerce Clause and treaty language granting the Sac and Fox jurisdiction over all who "settle upon their lands" as support for its broad assertion of exclusive tax authority. Additionally, the Tribe asserts that decisions on state taxation of gaming within Indian country should control the determination of whether non-tribal members are subject to state income taxes.

The Tribe's argument is unavailing for several reasons. First,

"[i]t can no longer be seriously argued that the Indian Commerce Clause, of its own force, automatically bars all state taxation of matters significantly touching the political and economic interests of the Tribes." *Colville*, 447 U.S. at 157. Second, the Tribe cites no authority showing the Supreme Court, this court, or any other court has interpreted the jurisdictional language of any Indian treaty so as to grant a tribe exclusive jurisdiction over non-tribal members. Third, we conclude the gaming decisions are entirely distinguishable from the present case. The payment of wages to nonmember employees is not comparable to the operation of bingo games designed to attract nonmembers onto Indian land in order to generate revenue. Finally, and most importantly, notwithstanding its bald assertion to the contrary, the Tribe has failed to show how the imposition of a state income tax on nonmember tribal employees frustrates tribal self-government. The Tribe argues that all tribal employees benefit from government services and regulations which protect workers, including an extensive tribal code, police, courts, etc.; however, the Tribe fails to demonstrate how state taxation of nonmember employees would interfere with providing these services or any other aspect of tribal government. We therefore conclude the Oklahoma Tax Commission may lawfully tax the income of those tribal employees who are not members of the Sac and Fox Tribe.⁵

III. Motor Vehicle Tax

Tribal taxation and registration of motor vehicles applies "to all motor vehicles owned by a resident of, and principally garaged within the jurisdiction of the Sac and Fox Tribe." Sac and Fox General Revenue and Taxation Act, Title 14, Chapter 8, Section 802. Thus, the Tribe may tag motor vehicles owned by both members and nonmembers.⁶

The State of Oklahoma imposes two motor vehicle taxes. The

⁵ Note, however, the State may not sue the Tribe to recover previously uncollected taxes. *Potawatomi*, ____ U.S. at ____, 111 S. Ct. at 911.

⁶ The district court apparently was mistaken regarding the scope of tribal motor vehicle licensing. Operating under the assumption that only tribal members could obtain tribal tags, the district court limited its ruling to the State's authority (or lack thereof) to tax tribal members owning automobiles properly tagged by the Sac and Fox Tribe. While we conclude this ruling is correct, we go further to address the State's authority to tax non-tribal members owning automobiles properly tagged by the Tribe.

first is the Vehicle Excise Tax calculated at three and one-half per cent of value and imposed upon transfer of legal ownership. The second tax is the annual registration fee imposed on every vehicle operated upon, over, along, or across any avenue of public access within Oklahoma. This tax is imposed in lieu of a personal property tax on automobiles. The Oklahoma Tax Commission enforces these taxes by requiring the purchaser of a vehicle previously tagged by the Tribe to pay back motor vehicle taxes for the time during which the vehicle was tribally tagged as a prerequisite to issuance of an Oklahoma title and license plate.

A. Taxation of Tribal Members

Moe and *Colville* are dispositive on this issue: a state may not require a tribal member residing on tribal lands to pay state motor vehicle taxes, whether in the nature of property or excise taxes. *Colville*, 447 U.S. at 162-64; *Moe*, 425 U.S. at 469, 480-81. Although characterized by the State as a sales tax and a use tax in an attempt to circumvent established precedent, the first state motor vehicle tax is not enforced as a sales tax against Sac and Fox purchasers, and the State has offered no evidence to show the second tax is tailored to the amount of use outside Indian country. Under the circumstances, both Oklahoma motor vehicle taxes are best characterized as property taxes and therefore are flatly prohibited under *Moe* and *Colville*.

Although the State does not impose such motor vehicle taxes on tribal members directly, requiring nonmember purchasers to pay back taxes on tribally tagged vehicles burdens tribal members by diminishing the fair market value of their automobiles upon sale. We will not permit the State to tax indirectly what it cannot tax directly. We therefore hold the State may not tax motor vehicles for periods when such vehicles were licensed properly to tribal members by the Tribe.

B. Taxation of Nonmembers

The Tribe again relies on the Indian Commerce Clause and treaty language as support for its assertion of exclusive tax authority over motor vehicles principally garaged on tribal lands. The Tribe also continues to assert that Indian gaming decisions should control this issue.

Again, we reject these arguments. As previously discussed, the

Indian Commerce Clause provides no independent protection from state taxation, and the Tribe cites no authority in support of its broad interpretation of treaty language. The gaming decisions are even more distinguishable in this context as the Tribe's sale of motor vehicle tags to non-tribal members more closely resembles the marketing of a tax exemption clearly disfavored in *Colville*. See 447 U.S. at 154-55, 160-61.

The Tribe emphasizes that the motor vehicles subject to tribal taxation are garaged within Indian country and are often parked for extended periods within Indian country while the nonmember owners work. The Tribe also asserts that nonmember motor vehicle owners receive government services from the Sac and Fox. Nevertheless, the relevant issue is tribal immunity. The Tribe cannot argue seriously that motor vehicles owned by non-tribal members constitute tribal property. Furthermore, the fact that non-tribal members may live and garage their motor vehicles on tribal land does not accord those individuals tribal status. Here again, the Tribe has failed to show how the imposition of state taxes on nonmembers' motor vehicles frustrates tribal self-government. We therefore hold the State may lawfully tax motor vehicles owned by non-tribal members.

IV. Conclusion

Evaluating the record presented on appeal in light of controlling Supreme Court precedent, we readily conclude the Oklahoma Tax Commission may not lawfully tax the income of tribal members who are employed by and receive wages from the Sac and Fox Tribe. The Commission is also without authority to collect taxes on motor vehicles for periods when such vehicles were licensed properly to tribal members by the Tribe. Conversely, the Commission may tax the income of non-tribal members employed by the Sac and Fox as well as those tribally-tagged motor vehicles owned by non-tribal members. The district court's ruling on cross motions for summary judgment is therefore AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

THE SAC AND FOX NATION,)
Plaintiff,)

v.)

NO. CIV-90-1553-A

THE OKLAHOMA TAX)
COMMISSION,)
Defendant.)

ORDER

Before the Court for determination are cross-motions for summary judgment. Each party has responded to the motion of the other, and after review of all briefs and the relevant law, the Court grants in part and denies in part each motion for the following reasons.

BACKGROUND

The relevant facts and many of the basic authorities are not at issue, and the parties only disagree as to the legal conclusions to be drawn. Plaintiff ("the Tribe") raises two issues: first, the defendant's ("the Commission") legal right to tax income derived from the Tribe by both Indians and non-Indians, and second, the Commission's legal right to require that, to obtain an Oklahoma motor vehicle title, non-Indian purchasers of Indian-owned vehicles must pay excise tax and license tags for the "back" years in which the vehicle was properly tagged by the Tribe.

Income Tax

It is agreed by the parties that this case arises on land near Stroud, Oklahoma, held in trust by the United States Government for

the benefit of the Tribe. The Tribe's headquarters are located on trust land, and the Tribe pays its officers and employees for services rendered to the Tribe primarily on the trust land. The Tribe also employs non-members and compensates them for their services. The Tribe levies its own tax on the earnings of its employees,¹ but argues that the Commission may not levy a state tax on income derived from the Tribe. The Commission does not contest the Tribe's right to levy its own tax, but claims that the Tribe must also collect state income tax on the earnings paid to its employees. The Tribe argues that the doctrine of tribal sovereign immunity prevents the Commission from imposing or collecting any state income tax on wages it pays to any employee.

Vehicle Tax

The Commission does not directly challenge the right of the Tribe to tag vehicles owned by tribal members and primarily garaged on trust lands. However, to obtain an Oklahoma title under the current system as administered by the Commission, the purchaser (or the seller) of a vehicle previously tagged by the Tribe must pay the tags and excise tax for the years in which the vehicle did not have Oklahoma registration and for which the statutes otherwise require payment. Okla. Stat. Ann. tit. 68, §2101 *et seq.*; Okla. Stat. Ann. tit. 47, §1101 *et seq.* The effect of this practice is to make the sale of Indian-owned vehicles commercially unfeasible; the Tribe also claims that this practice interferes with its right to self-government.

The Commission responds that, as to both issues of income tax and vehicle tax, the State of Oklahoma may tax members of the Tribe (as well as non-members) because the trust lands are not reservations. Earlier case law that has dealt with issues of income and motor vehicle tax has arisen in the context of reservations, and thus the Commission argues that a different result follows here. This Court disagrees.

¹ The Tribe has argued that the imposition of both its own tax and a state income tax results in some tribal members not paying the tribal tax. The Commission has not contested the Tribe's right to tax its own members, and that issue is not before the Court now. Any difficulty encountered by the Tribe on collecting the tribal tax is a matter between the Tribe and the tribal member, and is not germane to the issue of whether the Tribe may be required to collect state tax on income paid to its non-tribal employees.

DISCUSSION AND AUTHORITY

The parties have spent a large portion of their briefing efforts discussing the distinction (or lack thereof) between Indian Country and reservation. This is a distinction without a difference, though, in light of the Supreme Court's recent decision in *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, ___ U.S. ___, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991). The Commission made the same argument there as here, namely, that the Potawatomi Tribe should be required to collect state sales tax on cigarettes sold at tribal smokeshops to both tribal and non-tribal members because the smokeshops were located not on a reservation but on trust lands. The Supreme Court found that the important inquiry was "whether the area has been 'validly set apart for the use of the Indians as such, under the superintendence of the Government,'" and that trust land therefore "qualifies as a reservation for tribal immunity purposes." *Citizen Band Potawatomi Tribe*, 111 S.Ct. at 910.²

This conclusion makes directly applicable all the prior cases that have dealt with these very same issues, but that were decided in the context of reservations. A brief review is in order.

In *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973), the Court held that the State of Arizona could not levy or collect an income tax on wages earned by a Navajo tribal member from her work on the Navajo reservation. *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976) held that sales of cigarettes by Indians to Indians on the reservation could not be taxed by the state, but that sales on the reservation by Indians to non-Indians could be taxed by the state. The tax of sales to non-Indians was "a minimal burden designed to avoid the likelihood that in its absence non-Indians purchasing from the tribal seller will avoid payment of a concededly lawful tax. ... [N]othing in this burden...frustrates tribal self-government or runs afoul of any congressional enactment dealing with the affairs of reservation Indians." *Moe*, 96 S.Ct. at 1646 (citations omitted). The prohibition of tax of personal

² Based on the Supreme Court's conclusion that trust land qualifies as a reservation for purposes the tribal immunity, this Court uses the terms interchangeably in this Order. Where the words "trust lands" appear, the word "reservation" is equally applicable, and vice versa.

property located on the reservation also extended to motor vehicles owned by tribal members. *Moe*, 96 S.Ct. at 1644-45.

The tax of motor vehicles was considered again in greater depth in *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980). While the tax in *Moe* was placed on personal property, the tax at issue in *Colville* was an excise tax imposed for the privilege of using a motor vehicle in the State of Washington. The Court refused to allow Washington to circumvent *Moe* because the state had not tailored its tax to the amount of off-reservation use of a vehicle. In dicta, the Court indicated that Washington was free to levy a tax on use of a motor vehicle outside the reservation, but that its failure to do so required the Court to treat the case as a repeat of *Moe*.

The facts before the Court now do not vary in any significant way from those in the cases above. First, the Commission may not tax the income of Sac and Fox tribal members that is derived from tribal employment on trust land. The Supreme Court has examined and rejected the Commission's argument that the trust lands should be treated differently from the reservation land, and this Court will not disregard the Supreme Court's clear statement that lands held in trust are the same as a reservation for tribal immunity purposes.

However, the Commission may tax the income of non-tribal members derived from tribal employment on trust lands. This is entirely consistent with the minimal burdens imposed by collection of tax on cigarette sales in *Moe* and reaffirmed only two months ago in *Citizen Band Potawatomi Tribe*. Even though the Commission is prevented from suing the Tribe for damages to collect the tax, the Commission has available to it other methods of collecting revenue lawfully due to it. See, *Citizen Band Potawatomi Tribe*, 111 S.Ct. at 912.³

Second, the Commission's practice of requiring payment of tags and excise taxes that it considers delinquent for the years a vehicle was tagged by the Tribe attempts to do indirectly what the Commission cannot do directly. The Commission cannot under *Moe* and *Colville*

³ The Tribe's immunity does not in any way affect the liability of a non-tribal member for payment of state income tax, or the Commission's ability to collect that tax from the taxpayer. The Court only holds today that the Tribe cannot be sued for collection of tax on non-tribal members, and that the Commission cannot tax tribal members themselves who derive all their income from the Tribe's business conducted on trust lands.

require a tribal member living on trust land to pay state motor vehicle taxes, whether in the nature of property or excise taxes. The attempt to "retroactively" collect these taxes frustrates the proper exercise of tribal governmental, and is an impermissible attempt to interfere in the Tribe's legitimate functioning."⁴

CONCLUSION

The Commission's motion for summary judgment is granted insofar as it seeks to levy and collect income tax on income received by non-tribal members that is derived from tribal employment on trust lands. However, the Commission may not sue the Tribe for damages to collect the tax. The Commission's motion is denied insofar as it seeks to impose a state income tax on income received by tribal members on income derived from tribal employment on trust lands. The Commission's motion is also denied insofar as it seeks, as a prerequisite to issuing an Oklahoma motor vehicle title, to require payment of license tags and excise tax for prior years that a vehicle was properly tagged by the Tribe.

The Tribe's cross-motion is granted to the extent that the Commission's motion is denied, and is denied to the extent that the Commission's motion is granted.

It is so ORDERED this 17th day of April, 1991.

S/Wayne E. Alley

WAYNE E. ALLEY

United States District Judge

⁴ This ruling does not affect or reach an issue not raised by either party; whether the Commission can require tribally tagged vehicles to be tagged by the State if and when the vehicle leaves trust land or the reservation as that term is used by the Supreme Court.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

THE SAC AND FOX NATION,)
 Plaintiff,)
)
v.) NO. CIV-90-1553-A
)
THE OKLAHOMA TAX)
COMMISSION,)
 Defendant.)

ORDER

On April 17, 1991, this Court issued its Order disposing of cross-motions for summary judgment. Both parties have now moved for the Court to reconsider its Order, each apparently unhappy with the Court's ruling. After review of the briefs of counsel, and further review of the relevant law, the Court denies both motions to reconsider and adheres to its prior Order.

The Court believes it adequately stated its ruling and the reasoning upon which the ruling was based, but in an abundance of caution, it will restate its ruling and attempt to explain again how it reached the conclusion it did. The Court generally looks with great disfavor on motions to reconsider, but will give these parties the benefit of the doubt due to the complicated nature of the law at issue.

DEFENDANT'S MOTION TO RECONSIDER

Defendant's motion to reconsider complained that: first, the Court did not resolve whether the Sac and Fox reservation has been disestablished; second, the Court's ruling that Oklahoma may not impose income tax on tribal members' income from the tribe is in conflict with controlling Supreme Court cases; and third, the Court's injunction of the State's enforcement of motor vehicle taxes is overly broad and not supported by Supreme Court precedent.

1. Disestablishment of the Reservation

Defendant advanced this argument in *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, ___ U.S. ___, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991), and lost when the Supreme Court declined to draw the urged distinction between a reservation and trust land. Regardless whether defendant likes the result, the Supreme Court's conclusion could not be clearer that there is no distinction for tribal immunity purposes between a reservation and trust land that has been validly set apart for the use of the Indians.¹ 111 S.Ct. at 910.

The fact that trust land in Oklahoma is scattered randomly among hundreds of tracts of varying sizes does not change the Supreme Court's holding that trust land is the same as a reservation for tribal immunity purposes. The Court agrees with plaintiff's statement that "the question of whether the Sac and Fox reservation exists is technically irrelevant to the decision in this case." The Court would only change the word "technically"; the issue is flatly irrelevant given the Supreme Court's holding in *Citizen Band Potawatomi*. This Court is not required to determine issues not raised by the pleadings, and the existence of the reservation is likewise not a dispositive issue here. The many cases dealing with reservations are now applicable given the Supreme Court's ruling that trust land is to be treated as a reservation for tribal immunity purposes. Thus, the issue of existence of the reservation is simply not necessary to the resolution of this case. Defendant has tried this approach before and lost in the highest federal court in the land, and this Court will not enter a ruling directly contrary to a controlling case handed down only three months ago.

2. Income Taxation of Tribal Members

Defendant argues that *McClanahan v. State Tax Commission of*

¹ Defendant states that this Court concluded that trust land is a reservation, but misconstrues the Court's conclusion. The Court only concluded that for tribal immunity purposes there is no difference between a reservation and trust land. This is not the same as holding that trust land is a reservation. Whether trust land and a reservation are identical is not necessary to determination of this case, and the Court expressly does not reach that issue. Again, the Court's conclusion is only that for tribal immunity purposes, there is no difference between a reservation and trust land.

Arizona, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973) sets out a three-part test that must be met before a tribal member's income from the tribe may be exempt from state tax. Nowhere does the opinion set out such a test, and apparently defendant believes this test to be required from the facts of the case. It is true that the Indian involved in *McClanahan* lived on a reservation, but this Court does not read the case to mean that a tribal member who is employed by the tribe but living on non-Indian land (neither reservation nor trust land) is automatically subject to state income tax.

Instead, the focus of inquiry is tribal immunity. The Court in *McClanahan* did not have before it these exact facts, but this Court believes that the message remains the same: the tribe and its tribal employees enjoy immunity from suit for state income taxes. Defendant has neither argued nor demonstrated that it has acquired jurisdiction over the people or land of the Sac and Fox as provided by 25 U.S.C. §1322. Therefore, defendant's attempt to tax income derived from tribal employment by tribal members is inconsistent with tribal self-determination and tribal immunity.

3. Motor Vehicle Taxes

Defendant argues that the Court too broadly stated that the State may not require payment of registration and excise taxes on any automobile "properly tagged" by a tribe, because this language could include non-Indians who obtain tribal tags. The Court thought its language was clear, but for the benefit of defendant will restate its position. Only tribal members may obtain tribal tags and still have an automobile that is properly tagged. Defendant's construction of the Order to imply that the Court authorized avoidance by non-tribal members of Oklahoma motor vehicle taxes takes the language of the Order entirely out of context. There is no authority urged by plaintiff or known by this Court that provides a basis for a non-tribal member to tag an automobile with a tribal tag and thereby avoid Oklahoma motor vehicle taxes. This portion of the Order applies only to tribal members who own automobiles that are primarily garaged on trust land and tagged by the tribe of which they are members. This ruling does not depend on the extent of the Sac and Fox reservation, much as defendant would like the Court to decide otherwise. The ruling depends instead on tribal immunity, and is directly supported by *Washington v. Confederated Tribes of the Colville Indian Reservation*,

447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980).

To recap *Colville*, the Supreme Court held that the State of Washington could not circumvent the holdings of prior cases by denominating the vehicle tax as a "use" tax, rather than by calling it a "property" tax that had previously been held invalid. Washington had not attempted to prorate the use tax as to the extent of use of vehicles on and off the reservation, and thus the Court held that the state's attempt to tax without proration was prohibited. "Had *Washington* tailored its tax to the amount of actual off-reservation use, or otherwise varied something more than mere nomenclature, this might be a different case. But it has not done so, and we decline to treat the case as if it had." 100 S.Ct. at 2086.

This situation of prorated tax based on use of the motor vehicle on and off the trust land is what the Court implicated in footnote 4 on page 6 of the Order, and what the Court believes neither party raised or addressed. Defendant stated in its Motion to Reconsider that "[t]hat issue is what this case is about and was raised and briefed by the State in the Commission's [brief]." Defendant has apparently misunderstood the Court's footnote, because Defendant has not addressed, and the issue is not today before the Court, what the State may lawfully do toward prorating motor vehicle taxes under these narrow circumstances. Both parties briefed the issues in a "winner take all" posture, and did not consider or propose a legal position that could encompass prorated tax. The Court has gone to this length to explain its position in order to make clear to defendant that the Court has indeed decided the issues before it, and that it will not decide issues not before it.

In conclusion, defendant's Motion to Reconsider is based in large part, if not entirely, on the assumption that the Court must decide the "reservation" issue. Existence of the reservation is not material to determination of this case, and the Court's ruling stands.

PLAINTIFF'S MOTION TO RECONSIDER

Plaintiff urges the Court to alter or amend its judgment, arguing that the Court should have applied the bingo cases rather than the cigarette ones. Plaintiff asserts that it is not marketing an exemption as tribes do that sell cigarettes without a state tax, and that therefore the Supreme Court's holding in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987) should apply. In *Cabazon*, the Supreme Court held that the State of California could not

regulate tribally operated bingo games held on the reservation, because the regulation would "impermissibly infringe on tribal government." 107 S.Ct. at 1095. The Supreme Court distinguished bingo operations from cigarette sales where an exemption from state tax is sold by pointing to the generation of value on the reservation through activities in which [the tribes] have a substantial interest. See, 107 S.Ct. at 1094.

The sale of license tags is not akin to a bingo operation, and neither is employment of non-tribal members. The Cabazon tribe's operation of the bingo games was designed to attract non-tribal members onto the reservation in order to do business. In the case now before the Court, the non-tribal members are not lured to the tribal headquarters as potential customers of the tribe, but as employees. In other words, the Sac and Fox pay money to the non-tribal members, and not the other way around as in the context of a bingo game. Likewise, the sale of license tags by the tribe is limited to tribal members, and there is no possibility that the tribe could use license tags for a revenue raiser as the Cabazon tribe used bingo to raise revenue.

The Court rejects the bingo cases as controlling or even persuasive on the issues presented by this lawsuit, and adheres to its ruling that the state may enforce its laws as to motor vehicle taxes² and income taxes against non-tribal members. The fact that a non-tribal member may live on and garage an automobile on trust land does not thereby avail the non-tribal member of tribal status. The non-tribal member is subject to state motor vehicle tax laws regardless of his or her residence. The issue here is tribal sovereignty, and a non-tribal member by definition does not enjoy the benefits of tribal sovereignty.

Finally, plaintiff argues that treaties with the United States grant the Sac and Fox exclusive jurisdiction with all who "settle upon their lands," thus leaving no room for the state to tax non-tribal members who either work for the tribe or who live on trust land. For the reasons stated above with regard to tribal sovereignty, the Court rejects this argument as well. Further, the Court notes that no case law has been cited in support of this proposition.

² The Court does not by this statement alter its prior Order where it held that defendant may not require payment of "back" license tags and excise tax in order to obtain an Oklahoma motor vehicle title. That portion of the prior Order (as well as the rest of the Order) remains intact. The Court today only addresses, and rejects, the new argument raised by plaintiff that a non-tribal member who lives on and garages an automobile on trust land is exempt from paying state motor vehicle taxes.

CONCLUSION

After extensive review of the briefs and responses of both parties to both Motions to Reconsider, the Court denies both motions for all the above-stated reasons.

It is so ORDERED this 21st day of May, 1991.

S/Wayne E. Alley

WAYNE E. ALLEY
United States District Judge